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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 617

THE ORIGINAL TEACHER CAP COMPANY, INC., and STANLEY WILLIAMS, *Petitioners*

v.

CLYDE E. CLAPPER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
The Decision of the Court of Appeals is in Conflict with Decisions of this Court	5
Defendant's Proofs Fulfilled Requirements of this Court for Damages in Anti-Trust Cases	8
Conclusion	13

INDEX OF CASES

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251	7
Eastman Kodak Company v. Southern Photo Materials Company, 273 U.S. 359	5
Kiefer-Stewart Co. v. Seagrams, 340 U.S. 211	7
Story Parchment Co. v. Peterson, Co., 282 U.S. 555	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

THE ORIGINAL TRACTOR CAB COMPANY, INC. and STANLEY WILLIAMS, *Petitioners*

v.

CLYDE E. CLAPPER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Original Tractor Cab Co., Inc. and Stanley Williams, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on September 30, 1959, in the case there entitled: Clyde E. Clapper, Plaintiff-Appellee v. The Original Tractor Cab Company, Inc. and Stanley Williams, Defendants-Appellants, Docket No. 12470.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court are printed in the certified record and the nine copies of the printed record below filed herein (Plaintiff's Appendix to Brief, Vol. I, PA 365-406)*, and are reported at 165 F. Supp. 565, 116 USPQ 316. The opinion and judgment of the Court of Appeals are printed in the Appendix to the Plaintiff's petition for certiorari herein (p. A70), and are reported at 270 F. (2d) 616.

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1959. The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 1254(1).

QUESTIONS PRESENTED

1. Did the Court below deprive the plaintiffs of their rights under the Clayton Act, by erroneous requirements as to the type of proof needed to prove losses due to anti-trust violation?

2. Did the type of proof of loss of potential profits resulting from an admitted violation by the Plaintiff, of the anti-trust laws of the United States, satisfy the requirements of decisions of this Court for an award of compensatory damages?

3. Did the provision of the Clayton Act as to "cost of suit" include expenses necessarily incurred due to the economic duress imposed by this impact of the conspiracy on the business of the Defendant, including the defense of a suit instituted as a part of that conspiracy?

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* "PA", as used herein, refers to Plaintiff's Appendix to Brief in the Court of Appeals.

STATUTES INVOLVED

U.S. Code, Title 15, Section 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

The Plaintiff entered into a License Agreement (PA 491) on August 3-4, 1948, with Lee Flora, whereby these two patentees joined hands and together licensed exclusively three manufacturers, now by change of name, Comfort Equipment Company, Burch Manufacturing Company and Cab-Ette Company.

It is now conceded by Plaintiff, and was so found by the District Court below, that this License Agreement violated Sections 1 and 2 of the Sherman Act.

One of the terms of the illegal License Agreement provided that the parties thereto should contribute to a litigation fund, of which the Plaintiff, Clapper, was trustee and whereby he, Clapper, directed the policing of the licensed patents under control and direction of the manufacturing licensees.

In the summer of 1948, the Defendant, Original Tractor Cab Co., Inc., started the manufacture of tractor covers herein accused as infringements of the licensed patents. Thereafter, promptly upon the issuance of the Clapper patent, the latter sent a notice of infringement to the Defendant, Original, but no

action was taken immediately against said Defendant. In August, 1949, a second notice of infringement was sent to the Defendant by Fred M. Roberts, as attorney for the Plaintiff, and at the same time Mr. Roberts sent notices of infringement to all of the distributors of Defendant, Original, threatening to institute patent infringement suits against such distributors.

Thereafter, a meeting was held between Plaintiff and the licensees, early in 1950, and as a consequence of the understanding then reached between the joint conspirators, parties to the illegal License Agreement, this action was instituted on April 14, 1950, to enjoin the Defendants from patent infringement.

The Defendants filed an answer denying the validity and infringement of the patents and included a counterclaim against the Plaintiffs under the Clayton Act (U. S. Code, Title 15, Section 15) for damages resulting from the violation of the anti-trust laws by the then Plaintiffs to the suit.

Subsequently, the three licensees were joined as parties and thereafter, as a result of settlement, the action was dismissed as to the licensees and Flora.

The case was tried in June, 1957, on all issues presented by the pleadings, including damages for the violation of the anti-trust laws. The District Court entered its Findings of Fact and conclusions of Law and Judgment on January 13, 1958, holding that the Clapper patent was invalid, that the License Agreement under which the Plaintiff had instituted this action had interfered with the business of the Defendants, was a violation of Sections 1 and 2 of the Sherman Act and that the Defendants were entitled to such

damages as may be proven to have been caused by the illegal conspiracy.

The District Court found, however, with certain specific exceptions, that the Plaintiffs' proofs of damages for loss of potential sales were based on assumptions and conclusions and did not meet the requirements for proof of damages in such cases. The Court of Appeals has affirmed this finding of the District Court.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals is in Conflict With Decisions of This Court

This Court has, on several occasions, reviewed awards of damages for violation of the anti-trust laws and has consistently adopted a policy of finding a way for awarding damages where a wrong has been committed. Here the Court found affirmatively that,

> ". . . it is convinced, even beyond a reasonable doubt, that the defendant, Original Tractor Cab Co., Inc., has been damaged as a result of the impact of the conspiracy of the plaintiff, Clapper, and Flora and the licensees". (PA 395)

In *Eastman Kodak Company* v. *Southern Photo Materials Company*, 273 U.S. 359, the Court reviewed the evidence presented in support of the claim for damages resulting from the anti-trust violation. The evidence fell into two categories. One type of evidence consisted of the dollar amount of business done by Southern prior to the anti-trust violation and showed the total sales of all products, the sale of Eastman products and the total expenses for the entire business. The other type of evidence was an estimate by one of the officers of Southern as to what the ex-

penses would have been during the period of violation had Southern been allowed to continue the sale of Eastman products, estimating that the expense to it for handling the Eastman products would have been about 5% of the selling price of those products. Additionally, evidence was produced to indicate the probable sales of Eastman products during the period of the violation. These probable sales were based in part upon the actual sales made in an earlier period and upon the opinions of the witnesses as to the continued market for the goods.

Mr. Chief Justice Taft, speaking for this Court, stated that the evidence was mainly circumstantial, but was competent and that it showed the extent of damages as a matter of just and reasonable inference.

The District Court below, although finding that the Defendants had been damaged as a result of the impact of the conspiracy, characterized the type of proof submitted by the Defendants as based upon assumptions and conclusions which would lead the Court into speculation and conjecture. The type of proof submitted by the Defendants herein is precisely the same as the type of proof found sufficient by this Court in the Eastman Kodak case.

In *Story Parchment Co.* v. *Peterson, Co.*, 282 U.S. 555, the Court again dealt with the question of damages for a conspiracy in violation of the anti-trust laws. The evidence showed that the conspiracy respondents sold their goods below a fair profit, and even below the cost of production. The point at issue was the probable price that the petitioner would have received for its goods, but for the conspiracy in depressing prices. No one could say with absolute ac-

curacy what prices would have been in effect in a normal market during the operation of the conspiracy, but the claim for damages was based on a difference in prices in effect prior to the conspiracy and those thereafter. It was a matter of computation that there had been some actual and substantial reductions from which the probable amount of the loss could be approximated.

This Court held the proofs sufficient for the determination, based on reasonable calculation, and that it was not too speculative for determination of the damages in these anti-trust cases.

In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, the Court again considered two classes of evidence offered to show damages. One of these involved a comparison of the plaintiff's business before and during the conspiracy, and a second a comparison of plaintiff's business with the earnings of a competitor. Both classes of evidence were held competent and sufficient to show, by reasonable inference, the damages sustained due to the unlawful conspiracy. The Court there had occasion to point out:

> "The constant tendency of the court is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights." (265 of 327 U.S.)

In *Kiefer-Stewart Co. v. Seagrams*, 340 U.S. 211, the Court approved a judgment based on calculations of a certified public accountant who testified as to the total sales for each year prior to and during the conspiracy, the percentage of loss in business each year,

and the estimated loss of sales for the period of the conspiracy, upon which basis damages were awarded and the award affirmed by this Court.

Defendant's Proofs Fulfilled Requirements of This Court for Damages in Anti-Trust Cases

The Defendant's evidence on damages may be divided into four parts:

First, it showed the amount of sales of the Defendant prior to the impact of the conspiracy, that the Defendant had 17,450 established dealers for its products subjected to the impact of the conspiracy.

Second, the Defendant had entered into a contract with Firestone Tire & Rubber Company to supply its products to a large number of Firestone retail stores, and substantial quantities had been sold by the Defendant to Firestone under the contract, *and* the contract was terminated as a direct result of the impact of this conspiracy.

Third, two established distributors of the Defendant were directly interfered with by the acts of the conspiracy, immediately resulting in the loss of those distributors and the potential profits to be derived therefrom.

Fourth, the impact of this conspiracy imposed on the Defendant abnormal costs to maintain its rightful business and to defend that right to do business.

The computation establishing the loss of profits on potential sales rests upon a statistical determination as to the costs of the Defendant's product and the net profit therefrom computed with respect to the probable number of units of its product estimated by an

officer of Defendant to have been sold during the impact of the conspiracy.

The estimate of that probable number was substantiated under three basic divisions: the average number of units of its product sold to each of the Defendant's dealers prior to the impact of the conspiracy; the number of dealers established to sell the Defendant's product immediately prior to and during the impact of the conspiracy; and the growth of the market potential for the Defendant's product during the impact of the conspiracy. That growth of market potential used in the Defendant's computations paralleled the growth of the tractor numbers in use in the United States during the years involved, on the reasonable assumption that the demand potential for the Defendant's accessory product would increase in proportion to the number of tractors for which the Defendant's product was an accessory attachment.

The District Court found that the computation did not reflect identically some of the variables that may be involved in actual sales. That is true in any computation of potential profits and undoubtedly was true in the Eastman Kodak case, where the quantity of potential sales was estimated as well as the operating costs thereof in succeeding years. These are not the sort of things which justify the Court in discarding entirely the computations as a just and reasonable means of determining the loss of profits which the District Court found to have resulted from the impact of this conspiracy.

The District court found:

> ". . . it must be assumed that all of the dealers operate in states having climatic conditions where-

in tractor covers would have sales potential." (PA 396)

The Defendant's showing required no such assumption, but provided ample evidence, not disputed, that all of the Defendant's 17,450 dealers were climatically so located, and in the area where the products of the entire industry were being sold.

The District Court found further:

> "it must be assumed that each of the distributors and the dealers included in Williams' estimate would continuously and consistently handle and sell the Original products, and that they would do so throughout the years involved." (PA 396)

The evidence showed that all members of the industry, including the Defendant, during the years involved had a turn-over of distributors and dealers according to normal business experience, and that the Defendant's computations reflected potential loss of profit from the impact of the conspiracy.

The District Court gave as a further reason for failure to accept the showing made by the Defendant:

> "It must be assumed that the sales of the defendant, Original, would consistently increase annually and that there would be no peaks and valleys in its annual sales. The evidence in the case indicates that this was not true in the case of any of defendant, Original's, Competitors who were engaged in the tractor cover business in each of the years involved."

Apparently, the District Court would have had the Defendant's computations reflect the "peaks and valleys" of conspirators found by the Court to have dominated the market; and rejected the Defendant's

non-speculative theory that the demand potential for an accessory product is in direct proportion to the numbers of tractors in use and to which the accessory product is an attachment. The rejection of the Defendant's computation of potential sales on the premise that it did not rest on conditions highly speculative, is unreasonable and fallacious.

In the matter of "cost of suit" including expenses necessarily incurred in defense of action filed as an act of conspiracy, the District Court found:

> "There is little doubt in the mind of the court that the defendant, Original, did in fact suffer material damage as a result of this litigation. But the defendants had their opportunity during their day in court to establish such damage. They attempted to establish the damage suffered by the corporation, but the court was not convinced by their method and theory. Now is not the time to retry this element of their case. Nor is the taxing of costs of suit the proper means of fixing such damage. For this and the reason earlier set out in this entry, all of Item 6 will be disallowed." (PA 460)

The district Court, apparently, overlooked the fact that it had failed to include a finding on Item 6 presented in evidence during the trial. These were represented as a part of the "cost of suit" under the Clayton Act, and properly, should have been so considered.

This portion of the statute, apparently, has never been interpreted by this Court. It is clear that it has a meaning much broader than ordinary court costs, but it includes any expense of litigation of the injured party.

The District Court further found:

> "it is convinced, even beyond a reasonable doubt, that the Defendant, Original Tractor Cab Co., Inc., has been damaged as a result of the impact of the conspiracy of the plaintiff Clapper, and Flora and their licensees." (PA 395)

Even if the Court did not accept the Defendant's computations of loss of profits, and "cost of suit", in their entirety, the District Court did have the means available through computations, to determine for itself the amount of loss of potential profits and "cost of suit." As a trier of fact, the Court should have so determined what the evidence shows as to damages rather than to have rejected in its entirety this claim.

The type of evidnece presented in this case is entirely consistent with the requirements of this Court in prior anti-trust actions. The action of the Court below in rejecting the evidence, cannot be justified by its holding as a matter of law that the evidence did not meet the standards of a "just and reasonable inference" needed for a finding of the amount of damages that the Defendant, Original, has sustained.

By its rule of law, the Court below has unreasonably deprived the Defendants of their rights to damages and costs, under the Clayton Act.

CONCLUSION

It is submitted that the petition should be granted for the reasons given above.

Respectfully submitted,

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